No. 14738.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHWESTERN PUBLISHING CO., INC., a corporation, A. E. CAHLAN, NEVADA CITIZENS COMMITTEE INCORPORATED, SOUTHERN NEVADA CHAPTER, a corporation,

Appellants,

vs.

CHARLES LEE HORSEY,

Appellee.

Appeal From the United States District Court for the District of Nevada.

APPELLEE'S ANSWERING BRIEF.

RUDIAK, HORSEY & LIONEL,
Successors to
RALLI, RUDIAK & HORSEY,
201 Professional Building,
Las Vegas, Nevada.

CLYDE D. SOUTER,
Byington Building,
Reno, Nevada,
Of Counsel,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Statement of jurisdiction 1

Statement of the case 1

Argument 4

Appellee's answer to appellants' contention that the action of the jury in assessing damages, and the trial judge in denying appellants' motion for new trial resulted in an infringement of freedom of speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States 4

Appellee's answer to appellants' contention that the complaint does not set forth, and the evidence does not establish, a libelous publication 6

Appellee's answer to appellants' contention that there is no proof to support the verdict and judgment for ten thousand dollars compensatory damages 25

Appellee's answer to appellants' contention that there is no evidence of express malice to support the verdict and judgment for fifteen thousand dollars punitive damages 34

Appellee's answer to appellants' contention that the trial court erred in admitting in evidence the 1946 and 1950 Clark County election returns to appellants' prejudice 39

Conclusion 46

TABLE OF AUTHORITIES CITED

CASES	PAGE
Baldwin et al. v. Warwick, 213 F. 2d 485	26
Bank of America Nat. Trust & Sav. Ass'n v. Com. of Int. Rev., 126 F. 2d 48	5, 9
Bank of Italy v. Romeo, 287 Fed. 5	10
Bastine v. Atlantic Coast Line R. Co., 205 F. 2d 457	10
Black, Sivalls & Bryson v. Shondell, 174 F. 2d 587	7, 10
Bradley Min. Co. v. Boice, 194 F. 2d 80	26
Brooks v. Woods, 181 F. 2d 717	5, 9
Caldwell v. Crowell-Collier Pub. Co., 161 F. 2d 333	6, 16, 19, 23
Charles v. Norfolk and W. Ry. Co., 188 F. 2d 691	10
Cobb v. Lepisto, 6 F. 2d 128	25, 26
Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 64 N. E. 2d 75	6, 32, 38
Department of Water and Power of City of Los Angeles v. Anderson, 95 F. 2d 577	26
Estelle v. Daily News Pub. Co., et al., 101 Neb. 610, 164 N. W. 558	30, 31
Gaffney v. Scott Pub. Co., 212 P. 2d 817	23
Galveston Tribune v. Johnson, 141 S. W. 302	40
Graves, In re, 221 Pac. 411	14, 15
Hecht v. Alfaro, 10 F. 2d 464	10
Houston Printing Co. v. Hunter, 105 S. W. 2d 312	41, 42, 45
Howser v. Pearson, 96 Fed. Supp. 936	20
Landsberg v. S. F. & P. S. S. Co., 288 Fed. 561	10
Liquid Veneer Corporation v. Smuckler, 90 F. 2d 196	25, 27, 36
Mattox v. News Syndicate Co., 176 F. 2d 897	32, 40, 44

PAGE

Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 84 L. Ed. 774 8

Nevada State Journal Pub. Co. et al. v. Henderson, 294 Fed. 60 ..... 20, 36

New York Life Ins. Co. v. Doerksen, 75 F. 2d 96 10

Nock v. Fidelity & Deposit Co., 175 S. C. 188, 178 S. E. 839 45

Otero v. Ewing, 115 So. 633, 165 La. 398 ..... 33, 39, 40, 42, 43

Pennsylvania Casualty Co. v. Whiteway, 210 F. 2d 782 10

Phillips v. Baker, 121 F. 2d 752 8

Reynolds v. Pegler, et al., 223 F. 2d 429 ..... 11, 35, 38

Sacramento Suburban Fruit Lands Co. v. Elm, 29 F. 2d 233 9

Scott v. Times-Mirror Co., 181 Cal. 345, 184 Pac. 672 ..... 31, 32, 35, 44

Sharples Separator Co. v. Skinner, 251 Fed. 25 10

Southern Pacific Co. v. Guthrie, 180 F. 2d 295, 186 F. 2d 966 ..... 26, 32

Southern Pacific Co. v. Zehnle, 163 F. 2d 453 ..... 26, 27

Steil v. Holland, 3 F. 2d 776 10

Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555 10

Talbot v. Mack, 41 Nev. 245, 169 Pac. 25 ..... 11, 12, 17

Terry v. United States Fidelity & Guaranty Co., 82 P. 2d 532 43

Washington Post Co. v. O'Donnell, 43 App. D. C. 215; cert. den., 238 U. S. 625, 59 L. Ed. 1495 44

Western Nat. Ins. Co. v. Le Clare, 163 F. 2d 337 ..... 5, 9

Westropp v. E. W. Scripps, et al., 74 N. E. 2d 340 20

Whitcomb v. Hearst Corp., 107 N. E. 2d 295 33

Williams v. Dodds, 163 F. 2d 724 ..... 5, 9

RULES PAGE

Federal Rules of Civil Procedure, Rule 12(h) 7, 8, 10
Federal Rules of Civil Procedure, Rule 50 10
Rules of the United States Court of Appeals for the Ninth Circuit, Rule 17(6) 4

TEXTBOOKS

33 American Jurisprudence, Sec. 5 40
33 American Jurisprudence, Sec. 200 40
33 American Jurisprudence, Sec. 282 40
Restatement of the Law of Torts, Sec. 573 13
Restatement of the Law of Torts, Sec. 569(e) 13

No. 14738.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHWESTERN PUBLISHING CO., INC., a corporation, A. E. CAHLAN, NEVADA CITIZENS COMMITTEE INCORPORATED, SOUTHERN NEVADA CHAPTER, a corporation,

Appellants,

vs.

CHARLES LEE HORSEY,

Appellee.

Appeal From the United States District Court for the District of Nevada.

APPELLEE'S ANSWERING BRIEF.

Statement of Jurisdiction.

Appellee concurs with the Statement of Jurisdiction set forth on pages (1) and (2) of Appellants' Brief.

Statement of Case.

In October of 1950, Appellee occupied the office of Chief Justice of the Supreme Court of the State of Nevada. He was also, at that time, a candidate to succeed himself as a member of said Court. In the latter part of that month and year Appellee had occasion to

call upon one Paul K. Gardner, the publisher, of a weekly newspaper called the Lovelock Review-Miner [R. 115]. After the formalities of introductions were completed, Mr. Gardner asked Appellee, "Are you pro-labor?" to which Appellee replied "Yes, I have always been for labor" [R. 115]. Appellee immediately, and in great detail, proceeded to explain to Mr. Gardner what he meant by that statement and specifically informed Mr. Gardner that his oath of office and position on the Bench precluded him from being influenced at all by any personal or political sympathies for the working man and that his decisions were based entirely on accepted and sound judicial precedents as established by our State and Federal Courts. The conversation consumed a period of time of at least one-half hour [R. 115-120]. Appellee's conversation with Mr. Gardner was held in the presence of Charles Lee Horsey, Jr., who fully and completely corroborated Appellee as to his statements made during the course of the conversation [R. 137-140].

On October 26, 1950, an editorial appeared in the Lovelock Review-Miner under the by-line of Paul K. Gardner [Deft. Ex. A; R. 170].

Appellee takes issue with Appellants' statement on page (4) of their Brief wherein they state that Appellee read the Gardner editorial in the Lovelock Review-Miner during the campaign and did nothing about it. Appellee testified that he had seen some papers from around the State, but he was not certain whether the Lovelock Review-Miner was one of those or not, and that if it were he merely glanced at it [R. 131], and that he did not see the advertisement in the Las Vegas Review-Journal until after the election [R. 121]. Charles Lee Horsey, Jr.,

who accompanied the Appellee on the latter's compaign trip and who was with Appellee when he picked up some newspapers from a newsstand at Fallon [R. 132], testified that he did not see the Lovelock Review-Miner until after the election [R. 140] and the advertisement in the Las Vegas Review-Journal on the day of election [R. 140].

On Sunday, the 5th day of November, 1950, two days before the general election of November 7, 1950, the Appellants published and caused to be published in the Las Vegas Review-Journal, a daily newspaper owned and published by the Southewestern Publishing Co., Inc., at Las Vegas, Clark County, Nevada, a paid political advertisement occupying nearly a full page of said issue. Said advertisement reprinted the Gardner editorial and greatly embellished same and in the embellishment lowercased all of the letters in Appellee's name [R. 10-13; Pltf. Ex. 3; R. 112].

On July 22, 1952, Appellee filed an action for damages based upon the advertisement appearing in the Las Vegas Review-Journal [R. 3-20]. After a trial was had which resulted in a verdict and judgment for Appellee, and upon the granting of Appellee's motion for a new trial, based upon the ground of inadequacy of damages, a second trial ensued resulting in an award by the jury of $10,000.00 compensatory, and $15,000.00 punitive, damages [R. 182]. Appellants filed a motion for new trial [R. 91-92] and upon the hearing thereof same was denied [R. 95-96].

ARGUMENT.

Appellee's Answer to Appellants' Contention That the Action of the Jury in Assessing Damages, and the Trial Judge in Denying Appellants' Motion for New Trial Resulted in an Infringement of Freedom of Speech Guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Appellants have asserted, commencing on page (9) of their Brief, that the action of the jury in assessing damages in this case, and the trial judge in permitting the verdict to stand, has resulted in an infringement of the Freedom of Speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. An examination of the Record discloses that this contention is being asserted for the first time. Neither in their Motion for New Trial [R. 91-92], nor in their Statement of Points [R. 183-184], nor in their Specification of Errors (pp. 6-8 of Br.), have Appellants advanced this proposition. Appellee respectfully submits that they cannot now do so.

Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, states as follows:

> "In all cases, including those on petition for review to enforce or to set aside an order of a United States Board or Commission, the appellant or petitioner, upon the filing of the record in this Court, shall file with the clerk a concise statement of the points on which he intends to rely. With such statement the appellant or petitioner shall file a designation of all the record which is material to the consideration of the appeal or review and forthwith serve on the adverse party a copy of the statement and designation. The adverse party, within 10 days thereafter,

may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and if he shall not do so, he shall be held to have consented to a hearing on the parts designated. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only: *and the Court will consider nothing but those parts of the record and the points so stated.* If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed, or such other order made as the circumstances may appear to the Court to require. If the appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the Court shall think proper.

"All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record as well as the documents to be printed or omitted." (Emphasis supplied.)

This Honorable Court has had occasion to consider the above-quoted rule in a number of cases (when the rule number was 19(6)) and has declined to consider matters not set forth in the Statement of Points, in each case.

Brooks v. Woods, 181 F. 2d 717, 718;

Bank of America Nat. Trust & Savings Ass'n v. Commissioner of Internal Revenue, 126 F. 2d 48, 52;

Williams v. Dodds, 163 F. 2d 724, 725;

Western Nat. Ins. Co. v. Le Clare, 163 F. 2d 337, 340.

The decisions of this Honorable Court in the above-named cases leads to no other conclusion, it is submitted, than that Appellants may not now raise for the first time their contention that the action of the judge and jury in the instant case manifests an infringement upon the Freedom of Speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

That the freedoms protected by the First and Fourteenth Amendments to the Constitution of the United States are limited and restricted by the law of libel and slander is too well established to be seriously questioned (*Caldwell v. Crowell-Collier Pub. Co.,* 161 F. 2d 333, 336.) See also, *Cook v. East Shore Newspaper, Inc., et al.,* 327 Ill. App. 559, 64 N. E. 2d 75, where the very contention asserted by Appellants herein was rejected by the Illinois Court. In fact, Appellants admit to such limitations on pages (9) and (11) of their Brief. It is apparent, therefore, that Appellants are begging the question in advancing the proposition herein suggested. The determination of this appeal must be guided by the law of libel and the law as established by this Court relative to appeals in general.

Appellee's Answer to Appellants' Contention That the Complaint Does Not Set Forth, and the Evidence Does Not Establish, a Libelous Publication.

Appellants have asserted, commencing on page (11) of their Brief that Appellee's complaint does not state a cause of action in that the publication complained of was not libelous, and that the proof does not support a judgment and verdict in favor of Appellee for the

same reason. An examination of the record discloses that Appellants did not in their answer [R. 33-51] or during the trial of the cause [R. 103-182] or at any other time, raise the question of the failure to state a claim.

Rule 12(h) of the Rules of Civil Procedure reads as follows:

> "(h) Waiver of defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action. The objection or defense, if made at the trial shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received."

Appellee contends that Appellants have waived the defense of failure to state a claim by not presenting same either by motion to dismiss, or in their answer, or at the time of trial.

In the case of *Black, Sivalls & Bryson v. Shondell,* 174 F. 2d 587, 590, the Court stated:

> ". . . Under Rule 12, Rules of Civil Procedure 28 U. S. C. A., a defendant waives all defenses and objections which he does not present either by motion or in his answer except that the defense of failure to state a claim upon which relief may be granted

> may also be made by a later pleading if one is permitted or by motion for judgment on the pleadings or at the trial on the merits. *The record shows no such defense presented by defendant in a motion or answer and it must be deemed to have waived the defense that the petition did not state a claim upon which relief may be granted.* The motion which defendant made for judgment notwithstanding the verdict was on the grounds that 'the plaintiff's petition and the evidence discloses that there was no privity of contract between the plaintiff and the defendant' and that 'it was uncontroverted in the evidence that the five tanks delivered by defendant complied with the terms specified in the (written) order' given by Midwest to defendant. *It was made after the trial and did not preserve the defense of failure of the petition to state a claim. The defendant is therefore in the position of having waived that defense and may not urge it here."* (Emphasis supplied.)

To the same effect is a decision of this Honorable Court is the case of *Phillips v. Baker,* 121 F. 2d 752, 755, wherein the Court stated in referring to Rule 12 (h) of the Rules of Civil Procedure:

> ". . . Evidently, the paragraph was intended to provide that any defense permitted to be made by motion at the option of the defendant, and which is not raised *either* by motion *or* by the answer, will be deemed to have been waived. The Courts have so construed that rule."

Similarly, the United States Supreme Court in the case of *Mayo v. Lakeland Highlands Canning Co.,* 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517 would not consider the defense of failure to state a claim where said defense was not timely and properly made.

Appellee respectfully submits that Appellants are precluded from asserting that the complaint fails to state a claim upon which relief can be granted for the further reason that they have not included this contention in their Statement of Points and must be deemed to have waived it [R. 183].

Brooks v. Woods, supra;

Bank of America Nat. Trust & Savings Assn. v. Commissioner of Internal Revenue, supra;

Williams v. Dodds, supra;

Western Nat. Ins. Co. v. Le Clare, supra.

Appellants also contend that the evidence does not establish a libelous publication and therefore does not support a judgment in Appellee's favor. It will be noted here in examination of the record that at no time during the course of the trial did Appellants question the sufficiency of the evidence by a motion for directed verdict, as provided for in Rule 50 of the Rules of Civil Procedure, or otherwise. Having failed to do so, Appellants are now precluded from questioning the sufficiency of the evidence to support a verdict in favor of Appellee. In the case of *Sacramento Suburban Fruit Lands Co. v. Elm,* 29 F. 2d 233, 235, this Honorable Court stated:

> "The contention that the evidence was not sufficient to sustain the verdict and judgment requires no detailed examination, for the reason that defendant made no motion for an instructed verdict in its favor; nor did it object in any way to the action of the Court in submitting the issues to the jury. Under that situation this Court ordinarily, will not review the sufficiency of the evidence to support the verdict." (Citing cases.)

The above holding is reflected in other decisions of this Court:

Hecht v. Alfaro, 10 F. 2d 464, 466;

Steil v. Holland, 3 F. 2d 776;

Bank of Italy v. Romeo, 287 Fed. 5;

Penn Casualty Co. v. Whiteway, 210 Fed. 782;

Landsberg v. S. F. & P. S. S. Co., 288 Fed. 561;

Sharples Separator Co. v. Skinner, 251 Fed. 25.

Abundant authority exists in the other circuits to the same effect:

Bastine v. Atlantic Coast Line R. Co. (5th Cir), 205 F. 2d 457;

Charles v. Norfolk & W. Ry. Co. (7th Cir.), 188 F. 2d 691;

Strika v. Netherlands Ministry of Traffic (2d Cir.), 185 F. 2d 555;

Black, Sivalls & Bryson, Inc. v. Shondell, supra (8th Cir.);

New York Life Ins. Co. v. Doerksen (10th Cir.), 75 F. 2d 96.

In light of the foregoing authorities, Appellee respectfully submits that Appellants are precluded from asserting on appeal that the complaint fails to state a claim, for the reason that said defense was not raised by motion, or in the answer or at the time of trial as required by Rule 12(h) of the Rule of Civil Procedure; and are precluded from questioning the sufficiency of the evidence to support the verdict in Appellee's favor for the reason that Appellants did not preserve said question by making a motion for directed verdict, as required by Rule 50 of the Rules of

Civil Procedure, at the close of the evidence and before submission of the cause to the jury. But even if the law on this point were otherwise and contrary to what the Courts have held it to be, Appellee contends that the complaint in this action does state a claim and that there was ample evidence warranting a verdict in Appellee's favor.

Inasmuch as federal jurisdiction in this case is based upon diversity of citizenship and the publication complained of was published in the State of Nevada, the substantive aspect of the case is governed by Nevada law. (*Reynolds v. Pegler, et al.,* 223 F. 2d 429.) Libel *Per se* has been defined by the Nevada Supreme Court in the case of *Talbot v. Mack,* 41 Nev. 245, 169 Pac. 25, and is expressive of the common law. On page 30 of the Pacific Reporter citation the Court stated:

> "It is true that any false and malicious writing published of another is libelous *per se* when its tendency is to render the party contemptible or ridiculous in public estimation or expose him to public hatred or contempt. (Cooley on Torts, p. 401.) Words or expressions that tend to lower a man in the estimation of his acquaintances or detract from the confidence of his neighbors that he has enjoyed have in some instances been held to be libelous *per se*; . . ."

And on page 32 is found the following statement:

> "Viewing the question from another angle, we think a rule applicable to the subject may well be stated thus: Words are actionable *per se* which directly tend to the prejudice of any one in his office, profession, trade or business . . ."

Finally, in summation, the Court made the following observation on page 34:

> "Many other cases of like significance might be referred to as signifying what courts have held to be language libelous *per se*. None of them are analogous to the case at bar. In each of the cases to which we have last referred, language is used designating a given person with reasonable certainty and terms or assertions are resorted to in the libelous utterance imputing attributes which, with reference to the person, either by reason of the common use made of the term within the locality or the acceptation of the term or assertion generally, would naturally tend to degrade him in the estimation of his fellow men, or hold him out to ridicule or scorn, or would tend to injure him in his business, occupation, or profession."

Turning to the publication in question here [Pltf. Ex. 3, R. 10-13], we find the statements contained therein come squarely within the definition of libel *per se* as defined by the Nevada Court. At the outset of the publication there is a direct charge that Appellee was a labor racketeer by his own admission. After quoting the alleged conversation Editor Gardner proceeded to define "pro-labor" and by substituting his definition for that term no other conclusion can be reached but that Appellee was a labor racketeer. Clearly, the labeling of Appellee a "labor racketeer" would come within the definition of libel *per se* as defined by Nevada Supreme Court in the *Talbot* case. Of course, Mr. Gardner did not stop with that charge. He proceeded to impute improper motives to Appellee when he charged that Appellee was motivated in his decision of a specific case before him, to-wit, the

White Cross Drug Co. case, by a prejudice in favor of labor racketeers, rather than by a conscientious application of the law to the facts. Can there be anything worse, as far as a judge is concerned, than to be falsely charged with being prejudiced, in a particular case, in favor of labor racketeers or anyone else. The very concept and essence of justice demands that impartiality and fairness be the prime moral ingredients necessary to proper judicial temperament and to falsely charge a judge with the lack of these qualities by charging their opposites is to directly impugn his character by attacking his integrity and honesty. There could be no difference in falsely charging a clergyman as being agnostic. Such characterizations would be incompatible with the proper conduct of their professions.

The American Law Institute in its Restatement of the Law of Torts recognizes the impropriety of imputing bad motives to a public official. Section 573 of that publication states:

> "One who falsely and without privilege to do so, publishes a slander which ascribes to another conduct, characteristics, or a condition *incompatible* with the proper conduct of his lawful business, trade, profession, *or of his public office,* whether honorary or for profit, is liable to the other." (Emphasis supplied.)

Section 569 (e) states that the same rule is applicable to a libel.

That to charge a Judge with being partial to certain interests in specific litigation before him as being libel-

ous *per se* is aptly demonstrated in the case of *In re Graves,* 221 Pac. 411. In this case an attorney sent out circulars through the mails attacking the official and personal acts and conduct of one Judge Monroe. One of the charges made was as follows:

> "'In Metcalfe v. Pacific Electric Railway No. B-87332, Judge Monroe refused to set aside a verdict in favor of the defendant and grant a new trial, which judgment had been entered by mistake on a verdict to which only eight jurors agreed. See affidavits in the office of the clerk of the Superior Court.
>
> "'*Query: Would he set it aside if the judgment had been for the plaintiffs. The answer is, that he has never failed to set aside a judgment against a railroad; if the slightest flaw could be found in any stage of the proceedings.*'"

The California Court in commenting on this charge of partiality stated, commencing at page 412:

> "It is unnecessary here to attempt the establishment of limitations within which one may be confined in casting aspersion upon an incumbent of the judiciary during a heated campaign for re-election. Judge Monroe was not running for office, and no such occasion was presented. However, there are such limitations, and these questions have been settled by the Supreme Courts of this and most of the other states. In the matter of *Humphrey,* 174 Cal. 290, 163 Pac. 60, it is declared that even though the subject of attack was at the time a candidate for re-election to judicial office, an attorney at law was not privileged to falsely accuse the magistrate of acts amounting to a misuse of his office. It must be remembered and recognized that the language alleged to have been used by appellant contained charges of specific conduct which, if warranted by the facts,

> would amount to abuse of official authority. We have in these accusations not a criticism in the way of fair comment, nor of expression of opinion, but definite charges amounting to misuse of office. Such charges can only be justified by proof of their truth; *if they were untrue their publication constituted libel,* and for an attorney to libel a judge concerning his official acts is certainly ground for suspension or disbarment." (Citing cases.) (Emphasis supplied.)

While the *Graves* case was concerned primarily with disbarment proceedings of an attorney, the Court clearly held that to impute improper motives to a judge as to specific litigation before him is libel *per se* and being such a finding of moral turpitude was warranted to substantiate disbarment or disciplinary action.

On page 13 of their Brief Appellants state that the conversation between the Appellee and Paul K. Gardner was correctly reported according to unanimous testimony. No greater inaccuracy could ever be suggested. Not only does the testimony of Appellee [R. 115-117, 132-133] and Charles Lee Horsey, Jr. [R. 137-140] refute such a statement, but Appellants' own witness, editor Gardner, admitted more was said than he printed when he testified that Appellee in answer to Gardner's question as to whether he was pro-labor stated "I admit that I am pro-labor. The decisions of the Nevada Supreme Court are pro-labor. Therefore I am pro-labor" [R. 168], and a further statement by Gardner concerning whether the Supreme Court changed its decisions. Also, Gardner admitted that much of the conversation testified to could have taken place [R. 160] and that he remembered part of the conversation, certainly implying that there was more to the

conversation than he printed [R. 158]. So, under the guise of the truth, Appellants attempt to relieve themselves from liability by the vicious weapon of the "half-truth."

A somewhat similar situation took place in the case of *Caldwell v. Crowell-Collier Pub. Co., supra.* In that case the complaint alleged that a negro boy under indictment for rape had been snatched from jail and shot. Governor Caldwell of Florida wrote a lengthy letter to Colliers in which he stated that he didn't consider the killing to be a lynching inasmuch as there was no evidence of mob action and that he considered it to be murder. He went into great detail as to the investigation he had conducted, the results of which established beyond doubt in his mind that the killing was a murder and not a lynching. He also expressed concern in cases of this nature of young children being brought into Court and being subjected to the ordeal of cross-examination. He concluded that he was making a determined effort to awaken the citizens of the Counties to feel responsible for the officials they elect, for, although the Sheriff of the particular county wherein the killing took place was not personally involved, his stupidity and ineptitude had shown his unfitness for office. The complaint further alleged that Colliers published an article in which it stated that Gov. Caldwell did not consider the killing a lynching. No mention was made of the Governor's investigation, or his concern over the circumstances surrounding the killing, or his statement that he considered the killing a murder. The publication went on to say that Caldwell opined that the mob had saved the Courts considerable trouble and then quoted that portion of the letter relating to the ordeal of children appearing in Court as prosecuting witnesses.

The trial court dismissed the petition upon the ground that there was no libel *per se* alleged and inasmuch as no special damages were claimed the action must fail. In reversing the trial court, the Court of Appeals for the Fifth Circuit stated, commencing at page 335:

> "We think a case of libel is alleged. Publication is averred in Florida and throughout the United States, but the injury must have occurred mainly in Florida where the plaintiff resides and holds office, and the law of Florida is principally to be regarded. We observe, however, no substantial difference between the law of Florida and that of other common law States. A libel is a compound of written falsity and malicious publication, but the falsity may consist in untrue imputation as well as direct statement, and malice may be inferred from the nature of the charges made as well as from the circumstances. False imputations may be actionable *per se,* that is in themselves, or *per quod,* that is on allegation and proof of special damage. (33 Am. Jur., Libel and Slander, §5 (citing cases).) No special monetary or other damage is here alleged, so the question is, are the false imputations libelous *per se?* Imputation of a crime is not present. But it is enough, if the natural or necessary result of the imputation is to hold one up to public hatred, contempt or ridicule, 33 Am. Jur., Libel and Slander, §45; or to prejudice him in his profession, office, occupation, or employment *Id.* §63, and more particularly in his public office, §79 . . ."

The Court went on to define libel *per se,* quoting same from a Florida case which was identical to that given by the Nevada Court in *Talbot v. Mack, supra.* The Court then outlined the duties and responsibilities of the Governor under the Constitution of the State of Florida, his

oath of office, and punishments provided by law for misconduct in office.

Referring to the distortion of the Collier publication, the Court stated at page 336:

> "We have compared the picture made by the editorial with that presented by the public statement by the Governor included in the letter from which an excerpt was quoted. *One picture is almost the reverse of the other. The quotation is a correct one in itself, but the letter as a whole shows that so far from condoning lynching in general or this killing in particular which the Governor did not think properly to be called a lynching since no mob apparently was involved, he strongly censured the sheriff for stupidity and ineptitude, but did not feel justified in removing him, and warned all officers against any future laxness. It is not necessary that the false charge be made in a direct manner, if the words in their ordinary meaning convey it, and an insinuation is as actionable as a positive assertion if the meaning is plain.* (33 Am. Jur., Libel and Slander, §9.) *A jury might well conclude that the Governor was being held up as unfaithful to his office by reason of facts falsely stated and implied in the editorial."* (Emphasis supplied.)

In commenting upon the defense of qualified privilege the Court had this to say:

> "More broadly it is argued that since the publication related to a public officer and was by the public press, there is a qualified privilege which excuses it. Free speech and free press are an established part of our democratic institutions, but both are limited by the law of slander and libel. By word and by pen the official record and pronouncements of a public man may be discussed and criticized, condemned and even

> vituperated, *but the facts cannot be perverted with impunity*. Several of the Florida cases above cited were between public officers and newspapers. An earlier one is *Jones, Varnum & Co. v. Townsend,* 21 Fla. 431, 58 Am. Rep. 676. See also Nevada State Journal Co. v. Henderson, 9 Cir., 294 F. 60. *But we need not at present further discuss this asserted privilege, because the complaint alleges malice in fact, and privilege is never an effective cloak for malice."* (Citing cases.) (Emphasis supplied.)

In applying the principles announced by the Fifth Circuit in the *Caldwell* case to the case at bar, it is clear that the complaint in this action stated a valid claim. Here we have a complete distortion of a conversation between Appellee and Mr. Gardner to impute improper motives on the part of Appellee in rendering a decision in a specific case before him by implying that he arrived at such decision because of a prejudice for labor racketeers, as well as a direct charge that Appellee was a labor racketeer. And in holding that the complaint stated a claim upon which relief could be granted, which we are concerned with in this point, the Court of Appeals for the Fifth Circuit observed that it wasn't concerned with qualified privilege or fair comment as the complaint alleged malice just as the complaint here so alleged [R. 9-16]. Appellee can't help but feel that Appellants recognize the complaint as being one which stated a valid claim, and the evidence sufficient to establish a libelous publication, for they didn't question the sufficiency of the complaint by filing a motion to dismiss, or raising the matter as a defense in their answer, or by doing so during the trial either by a motion to dismiss or by a motion for directed verdict to attack the sufficiency of the evidence to establish a libelous publication.

It seems clear, therefore, that Appellee's complaint satisfied all the requirements necessary to state a valid claim so as to satisfactorily answer Appellants' assertion raised in this point and that Appellee's allegation of malice in his complaint dispenses with the matter of qualified privilege or fair comment as far as the sufficiency of the complaint is concerned. But let us examine the legal principles relative to the defense of fair comment to determine if, in other respects, such a defense was available to Appellants at the trial of this action.

It is a well settled principle of law, prevalent in an overwhelming majority of jurisdictions in this country, that a defendant in order to avail himself of the defense of qualified privilege or fair comment must establish (1) that his comment was based on true statements of fact, (2) that his comments were free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, and (3) that his publication was made in good faith and without malice. Such is the law in Nevada.

Nevada State Journal Pub. Co., et al. v. Henderson, 294 Fed. 60;

Howser v. Pearson, 96 Fed. Supp. 936.

In *Westropp v. E. W. Scripps Co., et al.,* 74 N. E. 2d 340, 345, the Ohio Supreme Court had occasion to fully discuss the requisite elements of the defense of fair comment. In its opinion, commencing at page 345, the Court had this to say:

> "Still more pertinent to the instant case is the rule applicable to public officers, as stated in 33 American Jurisprudence 92, Section 79, as follows: 'It is libelour *per se* to impute to a person in his character as a public officer incapacity or any kind of fraud, dis-

honesty, misconduct, or a want of integrity, or to charge that he has been induced to act in his official capacity by a pecuniary or other improper consideration.'

"Did the trial court err in rejecting the requested charge hereinbefore quoted and thereby refusing to direct the jury that the written publication complained of was libelous *per se?* In the opinion of the majority of the courts, the language of the publication clearly charged that the plaintiff as judge of the Municipal Court of Cleveland, not only granted to the defendant in the criminal case a continuance of his case, upon his application, but also that in so doing the plaintiff was motivated by the intercession of such defendant's politically powerful friends and by lawyers for underworld figures, who had influence and knew how to manipulate matters to obtain delays, and further that by granting the continuance to such defendant, plaintiff thereby afforded him an opportunity to commit murder and by reason thereof the blood of the victim was on the plaintiff.

"The action of the plaintiff thus charged by the publication was misconduct, in the performance of official duty, induced 'by a pecuniary or other improper consideration' and such as to constitute misfeasance, if not malfeasance in office. It is well settled that a publication of such character is libelous *per se.*

"The record shows an admission that at the time of the publication complained of defendant knew that the plaintiff had not granted to the defendant in the criminal case a continuance of his case, and that the plaintiff's only connection with the case was to grant the application of the prosecution for a continuance. The record further discloses that such application was made in open court and was granted upon the

insistence of the prosecution on behalf of the state that by reason of the absence of material witnesses, the arresting officers, proof essential to support the charge was not then available. As disclosed by the cases annotated in 110 A. L. R. 412, the majority rule is: 'In the majority of jurisdictions the rule that fair comment on and criticism of the acts and conduct of a public officer or candidate for public office are, in the absence of malice, privileged, *does not apply to false statements of fact.* In these jurisdictions, a defamatory statement of fact concerning one in public life, or who is a candidate for office, if false, is as actionable as would be such a statement concerning one in private life.' Cases from many jurisdictions, including Ohio, are cited in support of that rule.

"The minority rule as indicated is that 'the privilege extends to misstatements of fact in a publication or communication relatitng to the public officer, or a candidate for office, if the other conditions of qualified privilege exast.' It is there disclosed, however, that even under the minority rule, it must appear that the publication was made in good faith and without malice.

"In stating the general rule with reference to privilege it is said in 36 Corpus Juris 1283, Section 389: *'What is privileged, if that is the proper term, is the criticism or comment, not the statement of facts on which it is based. Generally speaking, comment or criticism must be founded on truth.* While ordinarily it does not consist of the assertion of facts, an allegation of fact may be justified by its being an inference from other facts truly stated. The right to comment or criticize does not extend to, or justify, allegations of fact of a defamatory character. If the publication is not comment or criticism, but a state-

ment of fact, the rules to be applied to the nature of recovery are those applicable to any other case of defamation; if defamatory and false, it is actionable, although made in good faith, without malice, and under the honest belief that it is true.' *No untruth can be the basis of fair criticism, and the expression of an opinion which carries with it imputation of wrongdoing is as much libelous as a direct charge of wrongdoing. The statements of fact commented on must be true if the defense of fair comment and criticism is to be available.* See Jones on the Law of Journalism, 99, Section 35."

Does the publication here in question meet the requisites of fair comment? Obviously, Appellant respectfully submits it does not. In the first place, as we have seen from the application of the principles of the *Caldwell* case, *supra,* a distortion of a statement of a person or the taking of words out of context so as to convey a totally different impression from that intended, it not a true statement of fact upon which to base a comment. Secondly, the publication charged Appellee with conduct of a criminal nature by labeling him a labor racketeer, (This imputation was not warranted even if the conversation as reported by Mr. Gardner was completely accurate, for a person could certainly be pro-labor without being a labor racketeer.) and in imputing misconduct in office in that a decision rendered by Appellee was based solely on a bias and prejudice in favor of labor racketeers.

In commenting on such limitations of privilege, the Washington Supreme Court in *Gaffney v. Scott Pub. Co.,* 212 P. 2d 817, observed:

"The law properly gives to the public press encouragement to voice its criticism of the conduct of public officials, but in the exercise of such privileges

a publication which imputes to them charges of misconduct in office, want of official integrity or fidelity to public trust, if false, is a violation of that privilege and gives rise to an action for damages." (Emphasis supplied.)

Finally, as will be more fully argued in a later part of this Brief, the pubication was made maliciously and this factor alone would defeat any other right appellants might have to assert the defense of fair comment although, as we have seen in a majority of jurisdictions, such malice is not necessary when a comment is based on misstatement of facts as is the situation here.

In summation, Appellee respectfully submits that Appellants are precluded from asserting for the first time on appeal that the complaint fails to state a claim or to assert that the evidence is insufficient to warrant a verdict for Appellee, by reason of their failure to make proper and timely objections; that even if such assertion could be made Appellee's complaint does state a claim upon which relief can be granted and the evidence was sufficient to warrant a finding by the jury in Appellee's favor; and finally the defense of fair comment is not available to Appellants by reason of the fact that such comment was based upon misstatement of facts, and improperly charged Appellee with improper and dishonorable motives and, as will be shown later, was made maliciously.

Appellee's Answer to Appellants' Contention That There Is No Proof to Support the Verdict and Judgment for Ten Thousand Dollars Compensatory Damages.

Although Appellants have, on page 14 of their Brief, advanced the contention that there is no proof to support the verdict and judgment for Ten Thousand Dollars compensatory damages, their argument asserts that there is no proof to sustain an award of compensatory damages at all. To this, Appellee respectfully refers this Honorable Court to his argument heretofore made in this Brief with reference to the question of the sufficiency of the evidence and suggests that Appellants by their failure to move for a directed verdict during the trial cannot now urge that there was a total failure of proof and no damages should have been awarded to Appellee. If Appellants concede that a finding for Appellee may have been proper but that there is insufficient evidence to substantiate the amount awarded Appellee as and for compensatory damages, then a discussion upon the power of a federal appellate court to review the question of excessiveness of damages, and an examination of the evidence, appears to be warranted. In either event, however, the result is the same.

The question of appellate review of a trial jury award of damages has been presented to this Court on several occasions.

Cobb v. Lepisto, 6 F. 2d 128;

Liquid Veneer Corporation v. Smuckler, 90 F. 2d 196;

Department of Water and Power of City of Los Angeles v. Anderson, 95 F. 2d 577;

Southern Pac. Co. v. Zehnle, 163 F. 2d 453;

Southern Pac. Co. v. Guthrie, 180 F. 2d 295, 186 F. 2d 926;

Bradley Min. Co. v. Boice, 194 F. 2d 80;

Baldwin, et al. v. Warwick, 213 F. 2d 485.

A study of these authorities reveals an interesting development of the law with reference to this subject. As indicated in the case of *Southern Pac. Co. v. Guthrie, supra,* an overwhelming majority of the United States Courts of Appeals and decisions of the United States Supreme Court do not permit the question of excessiveness of damages to be a subject for review by an appellate tribunal. Commencing with *Cobb v. Lepisto, supra,* this Honorable Court modified the majority rule somewhat and announced that review may be had if the damages awarded were "grossly excessive" and in the rehearing of the *Guthrie* case, *supra,* this was extended to mean "monstrous."

In the *Guthrie* case, *supra,* the trial jury awarded the plaintiff $100,000.00 damages and while this court thought the award too high it would not reverse the judgment because this court did not consider the award to be "monstrous." In a slander and false imprisonment case, *Bradley Min. Co. v. Boice, supra,* this court, in upholding a $60,000.00 judgment stated:

> "The power of this court in respect of verdicts claimed to be excessive is not coextensive with that of the district court. At most we can consider only whether the verdict is grossly excessive or 'monstrous.' Southern Pacific Company v. Guthrie, (9 Cir.), 186 F. 2d 926, 931-933. When the trial

judge is presented, as the judge was here, with a motion for new trial grounded on a claim of excessive verdict, his power to deal with such a claim is not limited as ours is to questions of law. He may set aside a verdict when he thinks it is against the weight of the evidence or for other reasons he deems sufficient. In this instance the judge, familiar with the atmosphere of the trial and sensible of imponderables which might prejudicially affect the action of the jury, was satisfied that their verdict was motivated by the evidence alone and that it was not excessive. On the record before us, certainly, we can not say that he was wrong."

And in *Liquid Veneer Corporation v. Smuckler, supra,* a libel case, this court upheld an award of $11,000.00 compensatory and $9,000.00 punitive damages as not being "unconscionable."

This Court recognized the limitations on appellate review as to this question in the decision of *Southern Pac. Co. v. Zehnle, supra,* when it stated:

"We recognize, as does the California law, the important part of the trial judge in determining a contention of excessive damages raised as here on motion for a new trial, which was denied. In *Bond v. United Railroads,* 159 Cal. 270, 285, 113 P. 366, 48 L. R. A., N. S., 687, Ann. Cas. 1912C, 50, the California Supreme Court said that the remedy of excessive verdicts 'is practically committed entirely to the judge who presides at the trial in the Court below' and that the power of appellate courts over damages 'exists only when the facts are such that the *excess* appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. See *Hale v. San Bernardino, etc. Co.,* 156 Cal. 713, 716, 106 P. 83;

Wheaton v. North Beach, etc., Co., 36 Cal. 590, 591. Practically, the trial court must bear the whole responsibility in every case.' " (Emphasis supplied.)

Let us now turn to the Record to determine the evidence offered on Appellee's behalf as to his damages and then examine the authorities and compare awards which have been sustained on similar evidence.

The Appellee's testimony establishes that his has been an illustrious career. He commenced public service in the year 1906 when he was first appointed and then elected district attorney of Lincoln County, Nevada, which at that time also embraced what is now known as Clark County. In 1913 he was elected State Senator from Lincoln County and served as Chairman of the Judiciary Committee of that body. He then was elected district judge of the Tenth Judicial District. In 1928 he was the Democratic nominee for Nevada's lone seat in the House of Representatives. He was appointed State Senator from Clark County in 1939 and again assumed the office of District Judge of the Eighth Judicial District in 1945. A short time later he was appointed by the Governor of the State of Nevada to the Nevada Supreme Court to succeed William E. Orr who had been elevated to this Honorable Court. In 1946 he was elected a Justice of the Nevada Supreme Court to fill the unexpired term of Judge Orr. He subsequently became Chief Justice of that Court, a position which he held until January, 1951. During the intervening years between public offices he practiced law and was awarded a certificate as an honorary member of the State Bar of Nevada in 1945 for having served forty years in good standing as a member of the State Bar of Nevada [R. 106-109].

Appellee testified that the publication had such a great effect upon him mentally that it got so that he couldn't talk to everybody that he met; that he began to think they were suspicious of him and considered him more or less a criminal; that he would hate to stop and talk with people because he felt they were suspicious as to his honor and integrity and finally he would avoid situations which required him to meet people; that there were times when he couldn't sleep at all; that he came to Las Vegas and tried to practice law but felt in his own mind that with the tremendous increase in population of Clark County he would have to spend most of his time disabusing the minds of the people of Clark County as to his honor and integrity [R. 122-125]. Appellants would have this Honorable Court believe that the loss of the election caused all of Appellee's mental anguish, but Appellee testified [R. 134] that the drastic effect was the publication assailing his honor and integrity and that he had never had that experience before although he had been a candidate in many elections. Appellee's testimony in this regard was substantiated by Charles Lee Horsey, Jr., who testified that Appellee left his office early every day and that all that was left of Appellee was his body; his spirit and heart was gone [R. 141]. There was also evidence of the wide circulation given to the publication when the court, upon the basis of admissions contained in Appellants' answers, instructed the jury that Appellants admitted to a circulation of 14,000 copies [R. 78], a sizeable distribution for the population of Clark County. And the size of the publication [Pltf. Ex. 3] itself was evidence of the prominence given the matter and the possibility of its being noticed.

In upholding a $20,000.00 compensatory award ($10,000.00 against each of two defendants) the Nebraska Supreme Court in *Estelle v. Daily News Pub. Co., et al.*, 101 Neb. 610, 164 N. W. 558, 560, had this to say:

> "It is insisted that the verdict is grossly excessive, and a number of instances where verdicts of lessor amounts have been set aside or remittiturs ordered have been cited. The plaintiff in this case was nearly 65 years of age. He had lived in Nebraska since 1872. In 1884 he was elected district attorney for the judicial district in which he lived. He was appointed by the Governor to fill a vacancy as judge of the district court. Afterwards he was elected to the same position, and has held that position constantly since January, 1900. He has been department commander of the Grand Army of the Republic for the district of Nebraska. He was inspector general of the national organization. Between terms of his court work he has served engagements as a lecturer upon the Chautauqua platform. Having occupied these public positions, Judge Estelle has been more or less in the public eye in the State of Nebraska and elsewhere for many years. At the time the libel was printed he was occupying judicial office and was a candidate for re-election. The publication charged him with being associated with 'the Third ward crowd' which the proof shows was largely composed of thieves, gamblers, pimps, and ballot-box stuffers. The evidence shows with respect to the 'Erdman Case' mentioned in the publication that instead of assisting in a 'frame-up' to send Erdman to the penitentiary, which is a fair implication from the published statement, Judge Estelle refused to accept a plea of guilty from Erdman when qualified by the statement that he was not able to fight the county. He appointed counsel for the defense and allowed

compulsory process for witnesses. In a number of other material matters the evidence disproves the imputations and statements of the publication. *The condition and station in life of one injured by a libel may be such as greatly to aggravate the injury, and a jury is entitled to take this into account in fixing the amount of recovery.* . . ." (Emphasis supplied.)

The factual parallel between the *Estelle* case, *supra,* and the case at bar is significant. In fact it would seem in many instances to require only a substitution of Justice Horsey's name for that of Judge Estelle in the Nebraska Court's opinion to have an accurate statement of the facts of this case. But even more significant is the Court's opinion that one's station in life may greatly aggravate the injury done and the jury is entitled to take that factor into consideration in assessing damages.

The question of the degree of proof necessary to sustain an award of substantial damages in a libel action is graphically illustrated in the case of *Scott v. Times-Mirror Co.,* 181 Cal. 345, 184 Pac. 672. In that case the only evidence offered by the plaintiff, an attorney-at-law, as to compensatory damages, was (1) a biographical sketch setting forth his educational background, and positions of honor held by him, (2) the nature of his practice, (3) the circulation of the defendant newspaper, and (4) the mental anguish suffered by him as a result of the publication. As to the latter his entire testimony was as follows:

"I was very indignant. I felt that a great injustice had been done to me, to my office and to my reputation. I felt it was degrading before my fellow members of the bar and before the community. It hurts yet. I believe it and I know it to be wholly

> untrue. I would say, so far as the statements of my office were concerned, it reflected on my office."

Upon the basis of the above-quoted testimony and his biographical sketch the jury awarded the plaintiff $7,-500.00 compensatory damages. The California Supreme Court in sustaining this award had the following to say with reference to the degree of proof required in cases of this nature.

> "The respondent is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel, or of what legal fees he has been deprived through its circulation, or what clients he has lost because of it. It is well settled that in such cases as this a jury may consider as a basis for its award of actual damages all of such matters as those set out above, including the wide publicity given the libel, plaintiff's prominence in the community where he lives, his good name and reputation, his injured feelings, and his mental sufferings." (Citing cases.)

The same guide as expressed in the *Scott* case, *supra,* for the assessment of damages is found in *Cook v. East Shore Newspaper, Inc., et al., supra,* where the court upheld an award of $20,000.00 to a Municipal Judge. To the same effect is *Mattox v. News Syndicate Co.,* 176 F. 2d 897.

Appellee respectfully submits that the evidence of Appellee as to his mental anguish and suffering is considerably stronger than that offered by the plaintiff in the *Scott* case, *supra,* which latter verdict was upheld by the California Supreme Court. Can it be said then, that the verdict in the instant case is so "monstrous," as that term is used by this Court in the *Guthrie* case, *supra,* to

warrant a finding of an abuse of discretion by the trial court in denying Appellants' motion for new trial? Appellee respectfully submits that obviously it is not.

In *Whitcomb v. Hearst Corp.,* 107 N. E. 2d 295, 301, the Massachusetts Supreme Court in upholding a $65,000.00 libel judgment commented upon the importance of placing great weight upon the verdict of the jury and discretion of the trial court, saying:

> "When considered in the aggregate the total recovery of the plaintiff seems large, especially in view of the numerous and complete retractions prominently published. But the jury and the trial judge saw and heard the plaintiff. From his testimony they could find that he was a man widely known and of much prominence in civil and military life for many years and that he had been entrusted with many heavy responsibilities in both fields. They could find that he enjoyed a substantial and valuable reputation which had been injured to an important degree. If they believed his testimony they could find that the articles had inflicted upon him severe mental suffering. They were in a position, in which we are not, to judge of the sincerity of his claims in this respect."

In view of the foregoing authorities, Appellee respectfully submits that the amount awarded Appellee by the jury is not grossly excessive or "monstrous," so as to warrant a finding by this Court of an abuse of discretion by the trial judge in denying Appellants' motion for new trial.

Appellee feels compelled to correct a statement of Appellants appearing on page 14 of their brief in which they cite the case of *Otero v. Ewing,* 115 So. 633, 165 La. 398, as holding that a charge that a candidate for judicial office is not impartial and entertains an admitted bias in

favor of a special interest group is not libelous *per se*. Either Appellants did not read that case or their imagination and enthusiasm carried them away for there was no charge of bias and prejudice involved in that case and the decision stands for three propositions, (1) that the mere fact that a person becomes a candidate does not mean that he offers his good name, reputation and character as a target for libelous attack against him, and (2) that one whose election to office is alleged to have been defeated by the publication cannot recover as damages the salary lost, and (3) charging a candidate for a judgeship with being an agent and a partner of a notorious criminal, and with receiving payments from gamblers and other confessed criminals, and with demanding money in the name of a city official to cover a deficit which did not exist, is libelous *per se*.

An examination of the case can lead to no other conclusion than that Appellants certainly possess flexibility of analyzation.

Appellee's Answer to Appellants' Contention That There Is No Evidence of Express Malice to Support the Verdict and Judgment for Fifteen Thousand Dollars Punitive Damages.

Although Appellants have, on page 15 of their Brief, asserted that there is no proof to support the verdict and judgment for Fifteen Thousand Dollars punitive damages, their argument contends that there is no proof to sustain an award of punitive damages at all. To this Appellee respectfully refers this Honorable Court to his argument heretofore made in this Brief with reference to the question of the sufficiency of the evidence to sustain a verdict at all for Appellee and suggests that Appellants by their failure to move for a directed verdict during the

trial are now precluded from urging that there was a total failure of proof and therefore no punitive damages at all should have been awarded to Appellee. If Appellants concede that a finding of punitive damages for Appellee may have been proper but that there is insufficient evidence to substantiate the amount awarded Appellee as and for punitive damages, then an examination of the authorities and the evidence appears to be warranted. In either event, however, the result is the same.

It is universally held that, in the absence of some indication of passion and prejudice, the amount of punitive damage is peculiarly within the province of the trial jury. In the case of *Reynolds v. Pegler, supra,* the Court of Appeals for the Second Circuit, in upholding a punitive damage award of $175,000.00, had this to say:

> "Moreover, in the absence of some indication of passion or prejudice, the amount of punitive damages to be awarded is an issue peculiarly within the province of the jury to decide. It is not our function to calculate what any or all of the defendants should be required to pay by way of punishment and in order to deter them from repeating the offense, but only to review the rulings by the trial judge which are said to constitute reversible error. As he applied the proper standards in passing upon the motion to set aside the verdict and for a new trial, we cannot find any abuse of discretion, and we should be required to reach the same conclusion, even if we thought the verdict excessive."

Scott v. Times-Mirror Co., supra, a case in which an award of $30,000.00 punitive damages was upheld, is a leading authority for the proposition that juries have a wider discretion with respect to punitive damage than

they have in the matter of compensatory damages. And this Court in *Liquid Veneer Corporation v. Smuckler, supra,* libel case, ruled that it would not invade the province of the jury and say that the punitive award was excessive. So it would seem crystal clear that a punitive award would have to almost be beyond all realm of understanding to be set aside. This Honorable Court is not faced with that situation here, however, for there was ample evidence of malice to substantiate the jury's finding.

It is to be noted from the evidence that the publication here complained of was published as a nearly full page advertisement on Sunday, November 5, 1950, after Appellee had left Las Vegas [R. 120] and the election in which Appellee was a candidate was held November 7, 1950 [R. 120, Pltf. Ex. 3]. Obviously, the jury could and probably did infer that the publication was timed so that there could be no reply to the charges contained therein, a definite indication of malice.

No effort was made to investigate the truth of the facts contained in the Gardner editorial either from the Appellee [R. 120-121] or from Gardner himself. Appellants' only contact with Gardner was to ask for his consent to a statement, which he refused, and a further request for permission to use the editorial, which he stated he could not prevent because it wasn't copyrighted [R. 173]. A failure to investigate the truth of the charges has been deemed a wanton and reckless disregard of the rights of others and is therefore malicious, for which punitive damage will lie. (*Nevada State Journal Pub. Co., et al. v. Henderson, supra.*)

Probably the best indication from which the jury found the Appellants were motivated by malice is found in the

publication itself wherein the Appellants lower-cased the first letters of the given and surname of Appellee. Could a more malicious intent be evidenced? Here we had a man who was occupying the highest judicial position in the State of Nevada not even being shown the courtesy of writing his name in a proper manner, a courtesy which is normally afforded to all persons. Couldn't the jury reasonably infer from this that the Appellants were attaching a "smallness" to Appellee which could only come from those with malicious motives? Is the lower-casing of a Supreme Court Justice's name comment or criticism or is it evidence of a vicious animosity which comes from a mind with evil motives intending to destroy and malign another? The jury gave the only proper answer and Appellee respectfully submits they were amply warranted in so doing.

But the deep-seated animosity and hatred of Appellants toward Appellee fairly screams out at the reader of that advertisement. The whole advertisement, covering almost a full page of the newspaper, is in practically every line a vicious attack upon the integrity, honesty, and impartiality of Appellee in the conduct of his office as a Supreme Court Justice.

In large print we find the words "Urge your friends NOT to vote for horsey for Supreme Court Justice!" And this particular choice paragraph, viciously attacking Appellee, continues in essence to charge Appellee as being prejudiced in favor of labor racketeers, gambling, and specialized interest.

The advertisement being simply one against Appellee, also reads "VOTE ONLY FOR AN IMPARTIAL CANDIDATE FOR SUPREME JUSTICE," which amounts to a positive charge that Appellee is not, and has not been, an impartial judge.

The advertisement further charges Appellee with a bias in favor of a special interest or group in that, inasmuch as it was an attack upon the Appellee, it states "NO MAN whose statements show a BIAS in favor of any special interest or group has any business on the bench!"

The final attack made upon Appellee in the advertisement charges Appellee with having a bias against the general public interest.

Could a publication the size of plaintiff's Exhibit 3 and the distribution given thereto by Appellants be said to have been accomplished by persons having altruistic motives? *Cook v. East Shore Newspaper, Inc., supra,* is authority for the proposition that the size, display and circulation of the publication may be taken into consideration by the jury in assessing punitive as well as compensatory damages.

Appellants in their Brief contend that inasmuch as Appellant Cahlan testified he had no personal animosity toward Appellee, there was no evidence of malice to warrant a finding of punitive damages. Appellee is not too impressed with that testimony and neither was the Court of Appeals for the Second Circuit when a similar contention was before it in *Reynolds v. Pegler, supra*:

> "The mere fact that there was no proof of personal ill-will or animosity on the part of any of the corporate executives toward plaintiff does not preclude an award of punitive damages. Malice may be inferred from the very violence and vituperation apparent upon the face of the libel itself, especially where, as here, officers or employees of each corporate defendant had full opportunity to and were under a duty to exercise editorial supervision for purposes of revision, but permitted the publication of the column without investigation, delay or any alteration

whatever of its contents. The jury may well have found on this evidence a wanton or reckless indifference to plaintiff's rights."

Appellee respectfully submits, therefore, that while he seriously questions the right of Appellants as a matter of law in this case to raise this question, it matters not, for there is ample evidence in the record to justify the award made by the jury, and being an award of punitive damages, a matter peculiarly within the province of the jury, the appellate Court, we respectfully submit, will abstain from interference with said award.

Appellee's Answer to Appellants' Contention That the Trial Court Erred in Admitting in Evidence the 1946 and 1950 Clark County Election Returns to Appellants' Prejudice.

Appellants contend, commencing on page 15 of their Brief that the Court erred in admitting in evidence the Clark County Election returns for the years 1946 and 1950. In support of this contention they cite the case of *Otero v. Ewing, supra.* While the actual holding of the *Otero* case is not as broad as Appellants would apparently like to have it, the Louisiana Court actually holding that a special damage claim for loss of salary cannot be sustained, let us assume that Appellants' statement as to the holding is correct. An examination of the record discloses that the very nature of Appellee's offer excluded any possibility of any claim being made for damages resulting from the loss of the election [R. 110-112, 178-179]. The returns were offered, as the record discloses, for the purpose of indicating a state of opinion in Clark County as to plaintiff's reputation in 1946 and 1950 and as evidence to support Appellee's claim for gen-

eral damages resulting from a loss of reputation, a loss which is conclusively presumed in publications which are libelous *per se* as here. (33 Am. Jur., Secs. 5, 200, 282.) See *Galveston Tribune v. Johnson, supra,* where the Texas court held even error in admitting opinion evidence as to plaintiff's reputation was not prejudicial because only general damages were awarded and there is a presumption of damage from an article which is libelous *per se.*

Assuming, for the purpose of argument, that no claim can be made for damages resulting from a loss of an election, it is settled that although evidence may be inadmissable as to a particular element of special damage, it may nevertheless be admissable to prove general damages. (*Mattox v. News Syndicate Co., supra.*) In that case, evidence was admitted showing that plaintiff had been away from work for a season. Plaintiff had not alleged special damage of wages lost in her complaint and for that reason such evidence was inadmissable. However, such evidence was permitted to be admitted for the purpose of showing plaintiff's mental suffering especially where, as here, as we will later show, the Court instructed the jury to award no damages for wages lost.

Appellee respectfully submits, however, that the admission of the returns did not establish a loss of an election, a showing which must be made to be objectionable as proof of special damages under the doctrine of the *Otero* case. It will be remembered that the returns were limited to Clark County. Inasmuch as the office of Justice of the Supreme Court is a state office and an election pertaining thereto is statewide, the returns from one county would not establish a loss of an election. *Furthermore, an examination of Appellee's Exhibits 2 and 5 shows*

that Appellee carried Clark County in both the 1946 and 1950 elections and, therefore, no loss of election was established by such evidence and the admission thereof cannot be said to be objectionable under the doctrine of the Otero case.

Appellee respectfully suggests that even if he had offered the returns for the purpose of showing damages resulting from the loss of the election, which he most certainly did not, such offer would have been proper. In the case of *Houston Printing Co. v. Hunter,* 105 S. W. 2d 312, 320, the Court stated:

> "Plaintiff pleaded injury to his political career and asked for damages because therefor, actual as well as special. We think an officer or even a candidate for office could plead a state of facts which, if proven, would entitle him to actual or general damages to his political career, or, upon the other hand, he could so plead and prove it as special damage. In the case of *Jenkins v. Taylor* (Tex. Cir. Appr.), 4 S. W. (2d) 656, 661, the court had under consideration the elements of plaintiff's general or actual damages for an alleged libelous instrument, and in discussing a requested instruction which was refused by the court, it was said:
>
> " 'The jury should not have been limited to the injury to plaintiff's business; he was entitled to injury to his reputation generally, and also to his political career, especially the latter, since the attack made upon him was in connection with his conduct as an officer and while he was a candidate for the same office. The petition does not allege any special damage, and it was not necessary that any should be proved.'
>
> "The opinion as reported does not disclose in what manner plaintiff claimed his political career had been

injured, but we may assume the allegations supported the judgment and thus justified the appellate court in its statement of the law applicable to the case.

"In Tex. Jur. Vol. 27, P. 700, §57, it is said: 'Injury resulting to plaintiff's political career * * * are also proper elements of special damages when pleaded and proven.'

"Likewise, in case of Galveston Tribune v. Johnson, 141 S. W. 302, 304, in which a writ of error was refused, it was said: 'Appellant specially excepted to certain portions of the petition wherein appellee set up as elements of special damages injury to his political career and his opportunities to secure public offices, which were overruled. In this we do not think the court erred.' The language used by the court indicates that a plea had been made by plaintiff that would have entitled him to special damages on account of injury to his political career had it been proven."

It will be noted that both the *Houston Printing Co.* case and *Taylor v. Jenkins* quoted therein are later pronouncements on this subject than is *Otero v. Ewing* relied upon by Appellants.

While Appellee earnestly contends that no error was committed in the admission of the Clark County 1946 and 1950 election returns, he submits that even though such admissions could be considered as error, such error was harmless and Appellants were not prejudiced thereby in view of Instruction No. 13 given by the trial court. This instruction [R. 84] provides as follows:

"One whose election to office is alleged to have been defeated by the publication of a libel cannot recover damages resulting from the loss of an elec-

> tion. Damages based on loss of election are too speculative and uncertain to be considered by the jury."

It doesn't require a very detailed study of that instruction to realize the tremendous scope covered by the charge. This instruction did not merely prevent consideration of the matter of lost salary resulting from the loss of an election which was the holding of the court in the *Otero* case, but it prevented consideration of any damages "resulting" from or "based upon" the loss of an election. So, Appellee respectfully submits, that the jury after reading that charge could not have possibly given any credence to the admission of the returns even if Appellee had offered them for the purpose of recovering damages for the loss of the election. Nor could they have given any credence to the returns for the purpose of indicating loss of reputation if, as Appellants contend, those damages stemmed from the loss of the election for the instruction was so broad as to exclude consideration of *any* "damages *based* upon the loss of an election." Appellants say on page 15 of their Brief:

> "Damages flowing from the loss of an election cannot be considered because they are too speculative and uncertain."

Isn't the language of the Court's instruction almost identical to the language used in Appellants' Brief? Obviously then the jury could not have considered the election returns admitted in evidence. In *Terry v. United States Fidelity & Guaranty Co.*, 82 P. 2d 532, the trial court erroneously admitted in evidence a custom of payment for subcontractors engaged in excavation work. In its charge, however, it told the jury that they could not

consider that custom in arriving at the amount of damages if they found in favor of the plaintiff. The Supreme Court of Washington held that such a charge removed any possibility of prejudicial error. See also *Mattox v. News Syndicate, Inc., supra,* where Court held that error, if any, was cured by an instruction not to consider certain evidence in assessing damages in libel action.

Appellee further contends that any possible error in the admission of the 1946 Clark County returns was harmless for the further reason and in view of the fact that competent evidence of a similar nature was admitted and without objection. Appellee testified as part of his biographical sketch that he had been elected to the office of Justice of the Supreme Court in 1946 "thanks to a large majority in Clark County" [R. 109]. That this testimony was competent has been established by the case of *Scott v. Times-Mirror Co., supra,* holding that a biographical sketch is admissible for the purpose of establishing general damages. Further, there was no objection by Appellants to the testimony. Any error, if there be error, must be considered to be harmless.

Washington Post Co. v. O'Donnell, 43 App. D. C. 215, cert. den. 35 S. Ct. 663, 238 U. S. 625, 59 L. Ed. 1495.

Appellee also asserts that any possible error in the admission of the 1950 Clark County returns was harmless for the additional reason that until the matter was elicited on cross-examination by Appellants there was no evidence of the loss of the 1950 election. It will be remembered that when the 1950 returns were admitted they were limited to Clark County, which we have already seen would not establish a loss of election of a state office.

It was not until the cross-examination of Appellee by Appellants that Appellee's defeat in 1950 was established [R. 126]. Appellants must be deemed to have waived any objection to the admission of the 1950 Clark County returns by bringing out the evidence of the loss of election themselves and such error, if any, in the admission of said returns, was harmless and not prejudicial to Appellant.

Nock v. Fidelity & Deposit Co., 175 S. C. 188, 178 S. E. 839.

In summation then, Appellee submits that the admission of the 1946 and 1950 Clark County returns was not erroneous, as they were not offered for the purpose of establishing damages for the loss of an election and did not in fact establish a loss of an election; that said returns were offered for an admissible purpose; that even if Appellee had offered said returns to establish damages resulting from the loss of an election, such admission would be proper pursuant to *Houston v. Hunter, supra;* that assuming error resulted in the admission of said returns, such error was cured, and therefore harmless, in view of the Court's instructions; that the admission of the 1946 Clark County returns, if error, was harmless in view of the admission of competent evidence of a similar nature which evidence was not objected to; and that the admission of the 1950 Clark County returns, if error, was harmless because the loss of the 1950 election was not established until elicited by Appellants on cross-examination.

Conclusion.

In view of the argument herein advanced and the authorities herein cited, Appellee respectfully submits that the judgment of the United States District Court for the District Court of Nevada be affirmed.

Respectfully submitted,

RUDIAK, HORSEY & LIONEL,
Successors to,
RALLI, RUDIAK & HORSEY, and
CLYDE D. SOUTER,
Of Counsel,
Attorneys for Appellee.